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IN THE
SUPREME COURT OF THE UNITED STATES

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

*Petitioner,*

v.

WAFFLE HOUSE, INC.,

*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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# BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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# BRIEF *AMICUS CURIAE* OF AARP IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1/]

AARP is a nonprofit membership organization of more than thirty-four million people age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research,

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amicus curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

publications, and training programs, AARP seeks to eliminate ageist stereotypes, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect their rights and strives to preserve the legal means to enforce them.

More than forty percent of AARP's members, most of whom are protected by the Age Discrimination in Employment Act (ADEA) and other federal laws prohibiting employment discrimination, remain active in the work force. The vigorous enforcement of these statutes is of paramount importance to all employees, including millions of older workers,[2] who rely on them to deter and remedy invidious bias in the work place.

To ensure that securing compliance with our nation's civil rights laws was not left only to private individuals, Congress empowered the Equal Employment Opportunity Commission (EEOC) to litigate in its own name for both injunctive and victim-specific relief in cases of unlawful employment discrimination. The court below has seriously impaired the congressionally mandated civil rights enforcement scheme by holding that an employer's imposition of an arbitration agreement deprives the EEOC of authority to litigate the right to victim-specific relief.

The Fourth Circuit's decision significantly curtails the EEOC's power to vindicate fully the public interest in eliminating discrimination from the work place. By limiting the EEOC to injunctive relief, the circuit court has removed a crucial incentive to encourage both self-corrective and preventive behavior on the part of employers - the prospect of potentially large, publicly proclaimed damage awards. This Court's decision holding that predispute agreements to

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[2] As of 2000, almost 67.9 million members of the work force (48.2 per cent) were age 40 or older. U.S. Bureau of Labor Statistics, "Employment and Earnings," Vol. 48, No. 1, January 2001 (DC: U.S. Government Printing Office), Table 3.



arbitrate deny individual employees the right to litigate discrimination claims[3] serves to emphasize the ever more crucial role of the EEOC in the enforcement of the nation's civil rights laws.

By depriving the EEOC of the authority to litigate victim-specific relief where the individual is bound by an arbitration agreement, the lower court's holding undermines the congressional grant of power to the EEOC to enforce the civil rights laws in another more subtle, but perhaps equally harmful way. For while it is true, as pointed out by the court below,[4] that an individual who must arbitrate his discrimination claim can still file an EEOC charge, there is little incentive for him to do so if, as in this case, the EEOC is precluded from pursuing individual relief. Further, due to the private nature of arbitration proceedings, if the discrimination victim fails to file a charge, the EEOC, because of simple lack of notice, will be deprived of the opportunity to seek the only relief left open to it by the decision below, an injunction, even in the most egregious circumstances. Thus, the public interest is doubly disserved by the decision of the court below. It is axiomatic that courts should not legislate. AARP respectfully submits that this is precisely what has occurred in the instant case.

For the foregoing reasons, AARP files this brief *amicus curiae* to urge the Court to conclude that the relief available in a civil rights enforcement action initiated by the EEOC is unaffected by an individual's agreement to arbitrate employment discrimination claims.

## SUMMARY OF ARGUMENT

In 1972, Congress rectified its failure to include effective enforcement powers in the Civil Rights Act of 1964 by

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[3] *Circuit City Stores, Inc. v. Saint Clair Adams*, 121 S. Ct. 1302 (2001).

[4] *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 811 (4th Cir. 1999).

amending Title VII to authorize the EEOC to vindicate the public interest in eliminating discrimination in the work place by bringing litigation seeking both injunctive and individual relief. It is inconsistent with that congressional mandate to allow a private arbitration agreement to deprive the EEOC of the authority to pursue individual monetary relief, which serves both a deterrent and remedial purpose. The ruling of the court below that an arbitration agreement, to which the EEOC was neither a party nor assented, divests it of the power to litigate victim-specific relief thwarts the will of Congress and undermines the enforcement of the federal antidiscrimination statutes. In short, it is unacceptable public policy to judicially handcuff the nation's primary civil rights enforcer to only injunctive relief simply because an individual employee, in whose interest the EEOC in its discretion has decided to act, has been shackled to an arbitration agreement. It is especially unjust to impair civil rights enforcement in the name of the federal policy favoring arbitration when the EEOC's pursuit of victim-specific relief has little or no effect on the arbitration of employment claims.

## ARGUMENT

### I. THE EEOC VINDICATES THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION FROM THE WORK PLACE WHEN IT SEEKS MAKE-WHOLE RELIEF ON BEHALF OF INDIVIDUAL VICTIMS.

In concluding that the EEOC is precluded from seeking make-whole relief on behalf of a charging party who is subject to an arbitration agreement, the circuit court ignored this Court's teachings concerning the twin goals served by back pay awards under this nation's anti-discrimination statues: eliminating discriminatory practices and providing a remedy for their past effects.

In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court described in significant detail the nature of claims



for back pay under Title VII.[5/] After first noting that "the primary objective [of Title VII] was a prophylactic one: 'It was to achieve equality of employment opportunities and remove barriers . . .,'"[6/] *id.* at 417, quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-30 (1971), the Court explained that:

> Backpay has an obvious connection with this purpose. If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges [of discrimination]."

*Id.*, at 417-18, quoting *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

In *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 356 (1995), the Court reaffirmed that compensation for injuries caused by discrimination under the ADEA, Title VII, and other federal anti-discrimination statutes, serves not only to make the victim whole, but also to deter future employer misconduct:

> the objectives of the ADEA are furthered when even a single employee establishes that an

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[5/] Since the substantive provisions of the ADEA "were derived *in haec verba* from Title VII," *Lorillard v. Pons*, 434 U.S. 575, 584 (1978), this principle applies with equal force to the ADEA.

[6/] This Court has acknowledged that the goals of the ADEA and of Title VII are the same. *McKennon v. Nashville Publishing Co*, 513 U.S. 352, 358 (1995), quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("The ADEA and Title VII share . . . a common purpose: 'the elimination of discrimination from the workplace.'").

> employer has discriminated against him or her. The disclosure through litigation of incidents or practices that violate national policies respecting nondiscrimination in the work force is itself important for the occurrence of ADEA violations may disclose patterns of noncompliance resulting from a misappreciation of the ADEA's operation or entrenched resistance to the ADEA's commands, either of which can be of industrywide significance.

513 U.S. at 358-59. If, as the Court has held, the private litigant who "seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the [anti-discrimination statutes]," *id.* at 358, it is illogical to suggest that an award of make-whole relief obtained by the EEOC, the federal agency charged with enforcing this nation's anti-discrimination statutes, does not.

In *General Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980), the Court stated "that the EEOC is not merely a proxy for the victims of discrimination . . . ." Rather, "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *Id.* Contrary to the conclusion of the court below, when suing in its own name for individual relief, the EEOC is not merely "do[ing] for [the charging party] what [he] could not have done for himself." *EEOC v. Waffle House, Inc.*, 193 F.3d at 812. Even when it sues on behalf of an individual, "the EEOC never ceases to represent the public interest as well. Indeed, whenever the EEOC sues in its own name, it sues both for the benefit of specific individuals and the public interest." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d 448, 458 (6th Cir. 1999).

The publicity surrounding a significant damages award obtained through an EEOC victory vividly illustrates how the EEOC's pursuit of individual relief "serve[s] as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of



discrimination," *McKennon*, 513 U.S. at 358, quoting *Albemarle Paper*, 422 U.S. at 417-18. Whenever the EEOC succeeds in either settling or prevailing in a lawsuit which includes a significant monetary award to the individual victims, the case and especially the award unfailingly receive widespread and prominent media coverage.[7/]

As the popular adage goes, "Money talks." When the EEOC's enforcement efforts result in large monetary awards, both employers and employees take notice. As the Christian Science Monitor noted in a story about the 1992 settlement of an age discrimination case against IDS Financial Services, Inc. for $35 million, while "the non-monetary aspects of the settlement could serve as useful guidelines," "the heavy financial penalties [ ] send a clear warning to corporate America. . . ."[8/] Whenever the press covers large monetary awards, "discrimination in the workplace . . . emerge[s] more strongly in the public consciousness." Sheila M. Poole and Gertha Coffee Braxton, *Bias in the Workplace; Two High-Profile Lawsuits Chill Companies, Give Workers Support*,

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7/ For examples of press coverage of large monetary awards in age discrimination cases in which the EEOC brought suit, *see, e.g., Company to Pay $28M to Settle Age-Bias Suit*, THE BOSTON GLOBE, July 30, 1999, at E2; Diana Kunde, *Lennox Agrees to Settle Age Bias Suit; $6.2 Million is Second-Largest Amount Awarded Per Person, EEOC Says*; THE DALLAS MORNING NEWS, May 12, 1998, at 4D; Ted Shelsby, *Age Bias Settlement Totals $14 million; Laid-off employees of Westinghouse Filed Suit*, THE BALTIMORE SUN, Nov. 1, 1997, at 1C; Kimberly Blanton, *Boston Edison Pays $2.25M in Age-Bias Case*, THE BOSTON GLOBE, Dec. 19, 1996, at D2; *Lockheed Settles Age Bias Lawsuit for $13 Million*, THE CHICAGO TRIBUNE, Nov. 22, 1996, at N-28; George Lane and Emily Narvaes, *Age-Bias Pact to Cost Martin $200 Million*, THE DENVER POST, Nov. 22, 1996, at A-01; Christopher Carey, *Ex-McDonnell Workers to Get $20 Million in Age Bias Case*, ST. LOUIS DISPATCH, Aug. 13, 1993, at 1A.

8/ *Experience Counts*, CHRISTIAN SCIENCE MONITOR, Sept. 1, 1992, at 20.

THE ATLANTA JOURNAL AND CONSTITUTION, Dec. 19, 1996, at O1E. Both management[9/] and plaintiff attorneys[10/] report an increase in inquiries after the announcement of a large monetary award.

Contrary to the assertion of the Second Circuit in *EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 303 (2d Cir. 1998), that there is "no reason to believe that the threat of an award of monetary damages obtained by a private individual through arbitration has any less deterrent value than the threat of an award of monetary damage obtained by the EEOC," there are excellent reasons to believe that even an exceptionally large damage award obtained through arbitration will have significantly less deterrent value than a similar or even smaller award or settlement obtained by the EEOC. First, arbitration decisions and accompanying awards are almost always private [11/] and, thus, do not receive the media attention accorded EEOC public settlements and court

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9/ According to one management attorney, "Companies are chilled by these results. . . And it's going to do two things: Companies are going to realize that settlements are going to come at a higher cost; and internally, companies are going to have to look at practices and control discussions, even in private, that have just a hint of discriminatory bents to them." *Experience Counts*, CHRISTIAN SCIENCE MONITOR, Sept. 1, 1992, at 20. These awards provide "expensive lessons" and often cause companies "to evaluate using diversity training programs for their managers or to expand existing ones." *Id.*

10/ According to one plaintiff's employment attorney, "Every time there's a big, public case, more [victims] come forward." Janet Kidd Stewart, *In the Know; It Pays to Educate Yourself About Workplace Rights*, THE CHICAGO TRIBUNE, Sept. 15, 1999, at CN-7.

11/ *See also* Mary Williams Walsh, *Court Considers if Employer Can Force Pledge Not to Sue*, THE NEW YORK TIMES, Nov. 3, 2000 at A1. ("Many [arbitration] agreements emphasize that the proceedings will be private; some even threaten fines for employees who talk about their grievances.").



victories. Therefore, although the lone employer that is subject to the award obtained through arbitration may think twice before discriminating again, the behavior of all other employers will be completely unaffected by an award of which they are totally unaware.[12/] *See* Reginald Alleyne, *Statutory Discrimination Claims: Rights 'Waived' and Lost in the Arbitration Forum*, 13 HOFSTRA LABOR L. J. 381, 431 (1996) ("It seems evident that a statutory social policy of deterrence, driven in part by the possibility of embarrassment over publicized public law violations, is not effectively served in any private arbitration forum.").

Second, employees who prevail in an arbitration forum are awarded far less in damages than in a judicial forum. *Id.* at 399. As pointed out in the concurrence in *EEOC v. Kidder, Peabody & Co.*, "[I]t [is] eminently plausible that the risk of a single, large award in an EEOC case brought on behalf of multiple employees would be a greater deterrent to illegal conduct than the risk of multiple smaller awards obtained by the employees through arbitration, and the EEOC pursuit of monetary damages therefore greatly advances the public interest." 156 F.3d at 304 (Feinberg, J., concurring.) Although Judge Feinberg felt "constrained to reach" the result supported by the *Kidder* majority opinion, he nevertheless "lack[ed] the majority's confidence ... that the deterrent value of damage awards in arbitration is equal to that of damage awards from EEOC action." *Id.*

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12/ *See EEOC Policy Statement on Mandatory Arbitration*, 133 Daily Lab. Rep. (BNA) E-6 (July 11, 1997) ("By awarding damages, . . . the courts not only compensate victims of discrimination, but provide notice to the community, in a very tangible way, of the costs of discrimination. . . the risks of negative publicity and blemished business reputation can be powerful influences on behavior.").

## II. THE PUBLIC INTEREST IN ELIMINATING DISCRIMINATION FROM THE WORK PLACE OUTWEIGHS THE POLICY FAVORING THE ENFORCEMENT OF PRIVATE ARBITRATION AGREEMENTS.

The court below acknowledged that in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Court "appears to have contemplated that arbitration agreements between charging parties and their employers would not infringe on the EEOC's statutory duty to enforce the antidiscrimination laws *in court*." *EEOC v. Waffle House, Inc.*, 193 F.3d at 811-12. Nevertheless, declaring that "when enforcing only the charging party's claim, the public interest of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief," *id.* at 812, the court below concluded:

> When the EEOC seeks "make-whole" relief for a charging party, the federal policy favoring enforcement of private arbitration agreements outweighs the EEOC's right to proceed in federal court because in that circumstance, the EEOC's public interest is minimal, as the EEOC seeks primarily to vindicate private, rather than public interests.

*Id.*

While the lower courts agree that the EEOC may not pursue victim-specific relief where the individual has unsuccessfully litigated[13/] or settled[14/] his/her claim on the legal ground of *res judicata* or mootness, respectively, the

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13/ *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993).

14/ *See, e.g., EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539 (9th Cir. 1987).



dispute presented by this case, *i.e.*, whether the private action of an individual who is deemed to have voluntarily agreed to arbitrate his discrimination claim can preclude efforts by the EEOC to vindicate the public's interest in the eradication of discrimination, is fundamentally a public policy question. In resolving the issue in favor of arbitration, the court below ignored the fact that in enacting and amending Title VII, "Congress conferred upon the EEOC the discretion to take away the right of private actors to resolve through arbitration Title VII matters that implicate the public interest." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d at 468. For this Court to hold otherwise would be tantamount to permitting any employee to contract away the duty of the EEOC to enforce vigorously the civil rights laws through the most effective litigation it can bring. A private individual, however, "cannot, by waiving [her] statutory right to vindicate [her] own interest, waive the statutory right of a federal sovereign to vindicate the public interest unless the government agrees to such waiver." *Id.* at 460.[15/] In effect, the circuit court's decision amounts to a legislative pronouncement and is contrary to sound principles of separation of powers.

### A. Removing the Potential For Backpay Awards from the EEOC's Enforcement Arsenal Eviscerates the Agency's Ability to Fulfill Its Mission of Eliminating Employment Discrimination.

"If Congress believed the EEOC could effectively eradicate employment discrimination through injunctive remedies alone, it would not have empowered the EEOC to obtain more." *EEOC v. Frank's Nursery & Crafts*, 177 F.3d at 466. In 1972, Congress resolved to remedy its failure to include effective enforcement powers in the Civil Rights Act of 1964 by amending Title VII to authorize the EEOC to bring suit in

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15/ Under the ADEA, "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." 29 U.S.C. § 626(f)(4).

federal court after conciliation efforts have failed. *See* Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261 § 4, 86 Stat. 103, 105. By that time, it was clear that the "failure to grant the EEOC meaningful enforcement powers [had] proven to be a major flaw in the operation of Title VII." S. Rep. No. 92-415, at 4 (1971). "Indeed, Congress expressed its concern that 'in the most profound cases,' employers had 'more often than not shrugged off the [EEOC's] entreaties and relied upon the unlikelihood of the parties suing them.'" *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d at 457, *quoting* H.R. Rep. No. 92-238, at 8.

Ignoring these expressions of congressional purpose to remedy the flaw in Title VII as originally enacted, the court below held that the federal policy favoring arbitration trumps the public interest inherent in the EEOC's power to seek victim-specific relief. Thus, the holding of the court below thwarts the express will of Congress by reverting in large part to the essentially private enforcement mechanism that Congress specifically rejected as ineffective in achieving its goal of elimination employment discrimination.

Additionally, this Court has acknowledged that the EEOC depends on the filing of charges for notification of possible discrimination. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68 (1984). The court below was quick to point out that while a private arbitration agreement precludes an employee from pursuing his discrimination claim in court, it does not prevent him from filing a charge with the EEOC. *See EEOC v. Waffle House, Inc.*, 193 F.3d at 811. On the other hand, neither does an arbitration agreement encourage him to do so. The employee actually may be *dis*couraged from doing so by the sheer futility of filing a charge where, because of the arbitration agreement, the EEOC is precluded from seeking individual relief through litigation. Moreover, for precisely that reason, the employer has absolutely no incentive whatsoever to even consider providing any monetary relief as part of the pre-litigation conciliation process.

Further, due to the private nature of arbitration proceedings, if the aggrieved individual, with little motivation



other than altruism, fails to file a public charge, the EEOC may *never* be notified of even the most egregious instances of discrimination. Thus, if the decision below is upheld, in many instances, due to simple lack of notice, the EEOC could even be deprived of the opportunity to seek the only relief left open to it, an injunction. The public interest in civil rights enforcement is, therefore, disserved by the decision below in not one, but two different, but related ways. This Court should, therefore, reject this attempt to undermine the enforcement of the nation's antidiscrimination statutes by consigning the public interest "to the law of the shop, not the law of the land"[16] in unnecessary deference to the federal policy favoring arbitration.

### B. The EEOC's Pursuit of Make-Whole Relief Does Not Compromise The Federal Policy Favoring Arbitration.

There is no evidence that preserving the congressionally mandated authority that the EEOC has wielded since 1972 to litigate relief for individual charging parties will, as suggested by the court below, "significantly trample" the federal policy favoring arbitration. *EEOC v. Waffle House*, 193 F.3d at 812. In fact, the opposite is true. The EEOC will be unable to pursue litigation on behalf of the vast majority of charging parties bound by arbitration agreements because its resources are quite constrained. Its budget is severely limited and the current administration's request of $310 million now pending before Congress amounts to an effective loss in funding for the next fiscal year.[17] Historically, the EEOC has filed suit only in approximately one half of one percent of all the charges it receives annually.[18] In fiscal year 2000, for

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[16] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974).

[17] *$310 Million Budget Request for EEOC Amounts to Effective Loss for Commission*, Daily Lab. Rep. (BNA), May 15, 2001, at AA-2.

[18] EEOC Litigation Statistics, FY 1992 through FY 2000; EEOC (continued...)

example, the agency reported that it received 79,896 charges of discrimination, but filed suit in only 327 cases, or 0.4 per cent of the charges received.[19/]

Therefore, it is "[un]likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration," *Kidder Peabody*, 156 F.3d at 304 (Feinberg, Circuit Judge, concurring), and the FAA would not be "unduly undermined by permitting the EEOC to pursue monetary damages on behalf of employees when it deems such action appropriate." *Id.*

Moreover, as the Sixth Circuit has explained, the individual's private right of action is not identical to that of the EEOC:

> [I]f an individual subject to an arbitration agreement filed a charge with the EEOC and ultimately received a "right to sue" letter, that individual would have a private cause of action that she waived by her prospective agreement to arbitrate. However, ... if the EEOC in turn exercised its right to sue, that individual would no longer possess a private cause of action subject to her prior agreement to arbitrate. *Rather, the EEOC would have a cause of action on behalf of that individual and the public interest that would fall outside the arbitration agreement.*

*EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d at 462 (emphasis added).

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[19/](...continued)
Charge Statistics FY 1992 Through FY 200), *available at* http://www.eeoc.gov/stats/charges.html (as of January 18, 2001) and http://www.eeoc.gov/litigation.html (as of January 31, 2001).

[19/] *Id.*



It is, therefore, inconceivable that the EEOC's pursuit of monetary relief for charging parties in its enforcement actions will have any effect on agreements to arbitrate.

## CONCLUSION

The decision of the court below incorrectly resolves the competition between the federal policy favoring arbitration and the effective enforcement of the nation's civil rights laws in favor of arbitration on the basis of what amounts to speculation that the EEOC's litigation of victim-specific relief significantly impacts the compulsory arbitration of discrimination claims. By holding that the EEOC may not litigate individual relief for an employee bound by an arbitration agreement, the lower court has profoundly restricted the ability of the EEOC to act in the public interest without any demonstration that such litigation affects significantly, if at all, the federal policy favoring arbitration. On the other hand, that decision thwarts the express will of Congress, which gave the EEOC the meaningful enforcement power now jeopardized in the uncertain name of arbitration. Because the decision below inflicts great harm on the enforcement of civil rights without conferring any articulable benefit on the arbitration process, AARP respectfully urges this Court to reverse the court below and hold that the congressionally granted EEOC enforcement powers are unaffected by private agreements to arbitrate.

Respectfully submitted,

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